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It's a Bird, It's a Plane, It's the FAA: Government Liability for Negligent Airworthiness Certification

*By Lawrence Yale Iser**

On October 4, 1960, Eastern Airlines Flight 375 began its take-off from Logan Airport in Boston. The Lockheed Electra airplane encountered a flock of starlings about 6/10ths of a mile from the beginning of the runway. Some of the birds were ingested by the engines, causing the number one engine to flame-out and shut off. Forty-seven seconds after take-off the plane went into a steep left bank and crashed into the harbor. Fifty-nine passengers and three crew members were killed.

One of the tests required for airworthiness certification of the Lockheed Electra was the "chicken test," in which the carcasses of four pound chickens were injected into engines intended for use in the airplane to determine the effects of bird ingestion upon the structural components of the engine. When the chicken test was performed, it was discovered that at specified speeds bird ingestion internally damaged the engine, resulting in a loss of power. Notwithstanding the test results, the Civil Aeronautics Administration (CAA) issued an unrestricted Type Certificate for the engine, approving the engine's design for use in commercial aviation.¹

On October 24, 1947, a United Airlines DC-6 was cruising over Bryce Canyon, Utah when the captain noticed that the plane's fuel tanks were not emptying evenly. To balance the load, he opened the cross-feed and activated the appropriate fuel-boost pumps. When he checked the results of the procedure, he found that one tank had overflowed, and was pumping fuel through the air vent. The fuel, captured by the airflow over the wings, was fed directly into the cabin heater air scoop, and when the heater automatically cycled on, an uncontrollable fire was triggered. The aircraft exploded, killing fifty-two. Three weeks later, on November 11, 1947, a similar accident involving another DC-6 occurred at Gallup, New Mexico.²

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1. *Rapp v. United States*, 264 F. Supp. 673 (E.D. Pa. 1967), *vacated by agreement*, 521 F.2d 1399 (3d Cir. 1970). See notes 77-94, 150 & accompanying text *infra*.

2. See *DeVito v. United Air Lines*, 98 F. Supp. 88 (E.D.N.Y. 1951). The *DeVito* action was not based upon these accidents, but rather on fire-fighting systems that were

The Douglas DC-6 first became operational in July, 1947. During the design stages of the DC-6, federal certification regulations stated: "It shall not be possible for fuel to flow between tanks in quantities sufficient to cause an overflow . . . [V]ents and [fuel] drainage shall not terminate at points where the discharge of fuel will constitute a fire hazard."³ The Civil Aeronautics Administration inspectors, ignoring a flagrant violation of these regulations, certified the DC-6 as airworthy for commercial aviation.

On October 8, 1968, a twin-engine DeHavilland-Dove crashed in Las Vegas during a scheduled air taxi flight between San Diego and Las Vegas.⁴ The applicable certification regulations require support for fuel lines,⁵ require high quality materials and workmanship,⁶ require a remote shutoff device for the fuel line,⁷ and establish a step-by-step procedure for reviewing and inspecting fuel line installations.⁸ The cause of the crash was determined to be a fire, ignited when gasoline escaped through a leak in an untreated copper portion of the fuel lines. This fuel line had been exposed to intense heat because the mounting and support of the line by the manufacturer had been inadequate.⁹ The aircraft nevertheless had been certified as airworthy by the Federal Aviation Administration.

These and similar aviation accidents raise the question of whether the government can and should be held liable under the Federal Tort Claims Act¹⁰ (FTCA) for the negligent certification of aircraft and

dangerous to the crew. The many actions brought following the accidents at Bryce Canyon and Gallup were settled prior to trial. For a dramatic description of the Bryce Canyon accident, see B. POWER-WATERS, *SAFETY LAST: THE DANGERS OF COMMERCIAL AVIATION—AN INDICTMENT BY AN AIRLINE PILOT* 199-200 (1972).

3. These regulations are codified presently at 14 C.F.R. §§ 23.957, 23.967 (1978).

4. United Scottish Ins. Co. v. United States, Civ. No. 70-138 (S.D. Cal. Apr. 2, 1975), *appeal docketed*, No. 76-2813-17 (9th Cir. July 30, 1975).

5. 14 C.F.R. § 23.993(a) (1978).

6. 14 C.F.R. § 23.603 (1978).

7. 14 C.F.R. §§ 23.951, 23.995 (1978).

8. See 14 C.F.R. §§ 23.951-.1001 (1978).

9. Appellant's Opening Brief at 7, United Scottish Ins. Co. v. United States, Civ. No. 70-138 (S.D. Cal. Apr. 2, 1975), *appeal docketed*, No. 76-2813-17 (9th Cir. July 30, 1975).

10. 28 U.S.C. § 2679(a)-(b) (1976). Most actions against the United States in tort are brought under the FTCA. However, for maritime torts jurisdiction against the government in the federal courts is based not on the FTCA, but rather on the Suits in Admiralty Act, 46 U.S.C. §§ 741-752 (1976), which provides the exclusive remedy in admiralty against the United States for maritime torts. In fact, the two leading airworthiness certification cases, *Rapp v. Eastern Air Lines Inc.*, 264 F. Supp. 673 (E.D. Pa. 1967), and *Arney v. United States*, 479 F.2d 653 (9th Cir. 1973), both were brought under the Suits in Admiralty Act. For this reason, the FTCA defenses of discretionary function and misrepresentation were not considered. See notes 54, 92-95 & accompanying text *infra*. In *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249 (1972), however, the Supreme Court held that federal admiralty jurisdiction does not extend to aviation tort claims arising from flights between

components, pursuant to the Federal Aviation Act of 1958¹¹ (Act), and the Federal Aviation Regulations promulgated thereunder¹² by the Federal Aviation Administration¹³ (FAA). Since the enactment of the FTCA, which relinquished the federal government's long-standing sovereign immunity from liability in tort, there have been numerous lawsuits for injuries and wrongful death arising from aviation accidents. A majority of the cases involved the negligence of air traffic controllers.¹⁴ The issue of the government's liability under the FTCA, however, has been raised in a variety of other circumstances as well, including exposure of homeowners to sonic booms,¹⁵ excessive noise from airplanes,¹⁶ negligent denial of pilot certification,¹⁷ and suits between parties where federal jurisdiction was sought.¹⁸ In each situation, liability generally has been imposed. Government liability for the negligent airworthiness certification of aircraft, however, is one area which remains unsettled.

Certification of an airplane or component part as airworthy is a three step procedure involving:¹⁹ (1) Type Certification, which approves the design of the component;²⁰ (2) Production Certification,

points within the continental United States, thereby eliminating the Suits in Admiralty Act as a source of federal jurisdiction in cases such as *Rapp*.

11. Pub. L. No. 85-726, 72 Stat. 731, as amended by 49 U.S.C. §§ 1301-1542 (1976).

12. 14 C.F.R. §§ 1-199 (1978).

13. The statutory framework of the Federal Aviation Administration is as follows: The Civil Aeronautics Act of 1938, ch. 601, 52 Stat. 973 (1938), as amended by Federal Aviation Act of 1958, Pub. L. No. 85-726, 72 Stat. 731, as amended by 49 U.S.C. §§ 1301-1542 (1976), established the Civil Aeronautics Board (CAB) and the Civil Aeronautics Administration (CAA), which became the Federal Aviation Agency in 1966, under the Department of Transportation Act, 49 U.S.C. §§ 1651-1659 (1976).

14. See notes 41-49, 82-91, 140, 143 & accompanying text *infra*.

15. *Kirk v. United States*, 451 F.2d 690 (10th Cir. 1971); *United States v. Gravelle*, 407 F.2d 964 (10th Cir. 1969).

16. *Griggs v. Allegheny County*, 369 U.S. 84 (1962); *United States v. Causby*, 328 U.S. 256 (1946).

17. *Duncan v. United States*, 355 F. Supp. 1167 (D.D.C. 1973).

18. *Gabel v. Hughes Air Corp.*, 350 F. Supp. 612 (C.D. Cal. 1972) (holding that the safety provisions of the Act imposed a duty on the defendant-carrier to perform its services with the "highest possible degree of safety in the public interest").

19. While an exhaustive survey of this procedure is not possible here, an excellent summary is contained in Kennelly, *Aviation Accidents—Liability of Manufacturers—Part II*, 18 TRIAL LAWYER'S GUIDE 265, 272-82 (1975). The Federal Aviation Act gives the administrator of the FAA the responsibility for aviation safety through the promulgation of a comprehensive regulatory scheme. 49 U.S.C. § 1421 (1976). The administrator has both an express authorization to regulate the aviation industry by establishing minimum safety standards, rules, and regulations, and a broad grant of power to establish any regulation necessary to provide for safety in air commerce. 49 U.S.C. § 1421(a) (1976). To market its product, the manufacturer of the airplane or component must satisfy the certification requirements prescribed by the Federal Aviation Act and the Federal Aviation Regulations. 49 U.S.C. § 1423 (1976).

20. 49 U.S.C. § 1423(a)(2) (1976); 14 C.F.R. §§ 21.11-53 (1978). The manufacturer

which approves the manufacturing process and quality control;²¹ and (3) Airworthiness Certification, which gives final governmental approval for the use of the component in commercial aviation.²² Governmental negligence in any step of this certification procedure, when the proximate cause of injury or death from an aviation accident, may give rise to a private action against the government under the Act.

The government commonly asserts three defenses in actions alleging negligent certification: (1) that no actionable duty is owed to individual claimants or their decedents under the Act;²³ (2) that the "discretionary function" exception to liability under the FTCA bars recovery;²⁴ and (3) that the "misrepresentation" exception to the FTCA encompasses and precludes FAA liability premised on negligent certification.²⁵ This Note examines the government's defenses in relation to the existing cases of negligent certification, and concludes that where negligent certification is the proximate cause of injury or death, the government can and should be held liable.

initially submits the design and performance data required by the FAA to determine whether the design of the aircraft meets FAA standards. The Type Certificate may be issued only upon proof that the design of the component meets detailed standards for operation, air safety, material, and performance. 14 C.F.R. §§ 21.11-.53 (1978).

21. The regulations specify the manner in which materials are purchased and establish quality control testing and inspection procedures. 14 C.F.R. § 21.143 (1978). The manufacturer may obtain a Production Certificate upon manufacturing product models in conformity with the specifications approved by the Type Certificate. 49 U.S.C. § 1423(b) (1976); 14 C.F.R. §§ 21.131-.165 (1978). Various safety regulations and quality control standards are imposed upon the manufacturer before the aircraft is assembled as a finished product. 14 C.F.R. §§ 21.139, 21.143 (1978). The Production Certificate must be possessed by each manufacturer for any aircraft or component part which is marketed. Otherwise the manufacturer will be unable to obtain an Airworthiness Certificate without further testing and inspection or, in the case of component parts, may not install the part on any certificated aircraft. 14 C.F.R. § 21.163 (1978).

22. 14 C.F.R. §§ 21.171-.199 (1978). A manufacturer operating under a standard Production Certificate is entitled to the Airworthiness Certificate with no further showing except for an inspection to determine whether the product is in conformity with the Type Certificate, and whether the product is in proper condition for safe operation. 49 U.S.C. § 1423(c) (1976); 14 C.F.R. § 21.183(b) (1978). The operation of any aircraft in air commerce without a current airworthiness certificate, or in violation of the terms of the certificate, is forbidden. 49 U.S.C. § 1430(a)(1) (1976); *see Rosenhan v. United States*, 131 F.2d 932 (10th Cir. 1942) (affirming the imposition of civil penalties for the operation of a civil aircraft without a current airworthiness certificate.) A person who desires to make a major change in the design of the aircraft by modification must obtain a Supplemental Type Certificate if the design no longer conforms to the design approved by the original Type Certificate. 14 C.F.R. §§ 21.111-.119 (1978). If a manufacturer desires to make a major change in the product, the original Type Certificate must be amended. 14 C.F.R. § 21.113 (1978).

23. See note 26 & accompanying text *infra*.

24. See notes 69-117 & accompanying text *infra*.

25. See notes 118-59 & accompanying text *infra*.

The Question of Duty

Claims against the United States for the negligent acts or omissions of its agents are governed by the provisions of the FTCA.²⁶ In interpreting the FTCA, the courts have established that "if the Government undertakes to perform certain acts or functions thus engendering reliance thereon, it must perform them with due care; [and] that [the] obligation of due care extends to the public and the individuals who compose it"²⁷

The issue of whether FAA safety regulations impose a duty of due care, the breach of which is actionable, has been considered in the context of many aviation problems, but nevertheless remains in contention.²⁸ In products liability cases,²⁹ air controller negligence cases,³⁰ and more recently in airworthiness certification cases,³¹ the existence of such a duty has been recognized by the courts on the basis of the Act

26. 28 U.S.C. §§ 2679 (a)-(b) (1976). The FTCA is a limited waiver of the sovereign immunity of the United States for the "negligent or wrongful act or omission of any employee of the [government] while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable" 28 U.S.C. §§ 2672, 2674 (1976).

27. *Fair v. United States*, 234 F.2d 288, 294 (5th Cir. 1956); *Gibbs v. United States*, 251 F. Supp. 391, 400 (E.D. Tenn. 1965); see *Clemente v. United States*, 567 F.2d 1140, 1150 (1st Cir. 1977), *cert. denied*, 435 U.S. 1006 (1978).

28. The leading opponents of the imposition of a duty of due care have maintained that the Act cannot give rise to civil liability. J. Harrison & P. Kolczynski, *Government Liability for Certification of Aircraft?*, 44 JOURNAL OF AIR LAW & COMMERCE 23, 29 [hereinafter cited as Harrison & Kolczynski]. Interestingly, both authors are attorneys for the Office of the Chief Counsel for the FAA. Author Harrison, as Assistant Chief Counsel, represented the government in *Hoffman v. United States*, 398 F. Supp. 530 (E.D. Mich. 1975), see notes 100-02 & accompanying text *infra*, and *Lloyd v. Cessna Aircraft Co.*, 429 F. Supp. 188 (E.D. Tenn. 1977), see notes 154-59 & accompanying text *infra*. Their comprehensive Article vigorously defends nonliability for negligent certification. Despite the authors' employer, their position must be considered unofficial.

In addition, the Act has been held to *imply* private remedies based on regulatory statutes. Note, *The Decline of the Implied Private Cause of Action Continued: The Third Circuit Construes the Federal Aviation Act*, 31 RUTGERS L. REV. 41 (1978). See also *United Scottish Ins. Co. v. United States*, Civ. No. 76-158 (S.D. Cal. April 2, 1975), *appeal docketed*, No. 76-2813-17 (9th Cir. July 30, 1975).

29. *Berkebile v. Brantley Helicopter Corp.*, 219 Pa. Super. Ct. 479, 281 A.2d 707 (1971). For a discussion of the *Berkebile* case see notes 36-39 & accompanying text *infra*.

30. *Hartz v. United States*, 387 F.2d 870 (5th Cir. 1968); *Ingham v. Eastern Air Lines, Inc.*, 373 F.2d 227 (2d Cir.), *cert. denied*, 389 U.S. 931 (1967); *Dickens v. United States*, 378 F. Supp. 845 (S.D. Tex. 1974), *aff'd*, 545 F.2d 886 (5th Cir. 1977); *Dreyer v. United States*, 349 F. Supp. 296 (N.D. Ohio 1972) (controller negligently misidentified an airplane carrying skydivers and proximately caused skydivers to jump into Lake Erie instead of an airfield); *Hennessey v. United States* [1971] 12 AV. L. REP. (CCH) ¶ 17,410 (failure to advise aircraft of departure from required flight path); *Stork v. United States*, 278 F. Supp. 869 (S.D. Cal. 1967), *aff'd*, 430 F.2d 1104 (9th Cir. 1970).

31. See notes 50-68 & accompanying text *infra*.

itself. Congress, recognizing that the nature of air carriage demanded uniform rules of operation,³² promulgated the Act to centralize and unify the federal government's efforts to provide safety.³³ As a result, the courts consistently have construed the Act as preempting state regulation of safety in air navigation.³⁴ In light of this preemption, and because federal regulations have the full force and effect of federal law,³⁵ courts have imposed upon the government the duty to perform these regulatory activities in a reasonably diligent manner and have imposed liability when the activities are performed negligently.

Government safety regulations have been recognized repeatedly as a partial basis for a standard of care. In *Berkebile v. Brantley Helicopter Corp.*,³⁶ for example, the defendant manufacturer was held strictly liable for a dangerous design defect which failed to provide the pilot sufficient time in which to autorotate³⁷ the blades in the event of a power failure. Because the helicopter had satisfied the minimum certification requirements and had been certified as airworthy by the FAA, liability was premised solely on the manufacturer's failure to take additional precautions to prevent an unreasonably dangerous condition.³⁸ However, the court noted in dictum that

[t]he Federal Aviation Agency's standards are far from meaningless. Considering the pre-eminence of the federal government in the field of air safety and the importance and standing of the FAA we would incline to the view that *failure* of the manufacturer to comply with the regulations would be negligence per se. Our view is strengthened by the fact that the FAA is empowered to lay down minimum standards and violation of such standards, if the proximate cause of the

32. S. REP. NO. 1811, 85th Cong., 2nd Sess. (1958); H.R. REP. NO. 2556, 85th Cong. 2d Sess. (1958).

33. S. REP. NO. 1811, 85th Cong., 2d Sess. (1958); H.R. REP. 2556, 85th Cong., 2d Sess. (1958); *Air Lines Pilot Ass'n Int'l v. Quesada*, 276 F.2d 892 (2d Cir. 1960). The court stated: "The Federal Aviation Act was passed by Congress for the purpose of centralizing in a single *authority* . . . the power to frame rules for the safe and efficient use of the nation's airspace." *Id.* at 894 (emphasis added). See also *United States v. Christensen*, 419 F.2d 1401 (9th Cir. 1969), where the court noted that the purpose of the Act was to "create and enforce one unified system of flight rules." *Id.* at 1404.

34. *Kohr v. Allegheny Airlines, Inc.*, 504 F.2d 400 (7th Cir. 1974); *Village of Bensenville v. City of Chicago*, 16 Ill. App. 3d 733, 306 N.E.2d 562 (1973).

35. *Stanley v. United States*, 239 F. Supp. 973 (N.D. Ohio 1965); *Lange v. Nelson-Ryan Flight Service, Inc.*, 108 N.W.2d 428 (Minn. 1961).

36. 219 Pa. Super. Ct. 479, 281 A.2d 707 (1971).

37. When the engine of an airborne helicopter stops, the helicopter will fall to the ground unless the blades are placed in autorotation. If the blades are placed in autorotation, their angle differs from that of their angle at flight, and they continue to revolve, and the helicopter may be guided to a safe landing. If the blades are not put in autorotation, they may be snapped off in the air as the plane falls by hitting against stops which are necessary for their control while on the ground. *Id.* at 709.

38. *Id.* at 710.

injury should submit the violator to liability.³⁹ Although *Berkebile* and similar cases⁴⁰ have not involved the government as a party, they serve to illustrate the importance of government safety regulations in setting minimum standards of care in the aviation industry.

A second line of cases, which did involve the government as a party, arose from accidents caused by the negligence of air traffic controllers. In these cases, the courts have shaped a duty of due care based in part on the provisions of the Air Traffic Control Procedures Manual of the FAA (ATCPM). The rulings are based on the rationale that when the government undertakes to perform services, which in the absence of specific legislation would not be required, it will be liable for negligent performance of those services.⁴¹

One such case, *Ingham v. Eastern Airlines, Inc.*,⁴² involved a crash during an attempted landing on a runway engulfed by swirling fog. The complaint alleged that the controller who had failed to report a reduction in visibility from one mile to three-quarters of a mile was negligent in not providing the pilot with accurate and up-to-date weather information. The government claimed that the controller was under no obligation to inform the crew because the airplane's minimum landing requirement was one-half mile. The court, relying on a provision of the ATCPM which required the tower to furnish "a report

39. *Id.* (emphasis added).

40. See *Manos v. Trans World Airlines Inc.*, 324 F. Supp. 470 (N.D. Ill. 1971) (non-conformity of thrust reverser system with Civil Air Regulations held to be evidence of a breach of duty); *Maynard v. Stinson*, [1937] 1 Av. L. REP. (CCH) ¶ 698 (manufacturer's failure to provide adequate drains for loose gasoline in violation of Department of Commerce regulations).

41. *Hartz v. United States* 387 F.2d 870, 874 (5th Cir. 1968); *Ingham v. Eastern Air Lines, Inc.*, 373 F.2d 227, 236 (2d Cir.), *cert. denied*, 389 U.S. 931 (1967). Actually, the courts need not rely on the provisions of the ATCPM. The common law duty of due care imposed upon the air traffic controller is much greater than the duty the courts have shaped around the manual. In *Eastern Air Lines, Inc. v. Union Trust Co.*, 221 F.2d 62 (D.C. Cir.), *aff'd sub nom. United States v. Union Trust Co.*, 350 U.S. 907 (1955), the controllers failed to issue to an Eastern plane a timely warning of the presence of a P-38 on final approach and failed to warn the P-38 that Eastern was on final approach. This failure to warn of the traffic was held to be actionable negligence under the FTCA. See text accompanying notes 80-82 *infra*. In *United Airlines, Inc. v. Wiener*, 335 F.2d 379 (9th Cir. 1964), *cert. dismissed*, 379 U.S. 951 (1964), the court held that the failure of the CAA to notify United of the existence of Air Force maneuvers in the airway through which the United plane was flying constituted actionable negligence. See text accompanying notes 83-85 *infra*. In *Maryland v. United States*, 257 F. Supp. 768 (D.D.C. 1966), the court held that the controllers were guilty of actionable negligence in failing to observe sufficiently and transmit timely warnings of the presence of a United States T-33 jet in the vicinity of a Capital Airlines Viscount.

While a violation of an express regulation of the ATCPM undoubtedly is easier to prove, the common law duty to act reasonably imposes a greater burden on the air traffic controller.

42. 373 F.2d 227 (2d Cir.), *cert. denied*, 389 U.S. 931 (1967).

of current weather conditions, and subsequent changes, as necessary, . . ."⁴³ held that a reasonable interpretation of the section required the controller to report a twenty-five per cent drop in visibility, and that the omission constituted actionable negligence.⁴⁴

As a result of this decision, the controller's duty under the Act is not confined solely to the narrow limits of the ATCPM,⁴⁵ but is subject to the additional, judicially-inferred requirement of reasonableness. The Act, in giving the FAA supervision over commercial flight, imposes a duty upon the FAA to act reasonably in all activities involving flight safety.⁴⁶ The ATCPM is not determinative of, but merely a guideline for, what is to be considered a minimum standard of care. Thus, while a violation of an express regulation constitutes negligence per se, strict adherence to the regulation does not always satisfy the FAA's obligation of due care.⁴⁷ For example, courts have held that in emergency situations, when a controller realizes that the first warning has gone unheeded, a second warning must be issued.⁴⁸ Similarly, controllers owe a duty to warn a pilot that the visibility at an airport is below the take-off minimum for the aircraft, and that the flight is forbidden by FAA regulations, even though no such warning is specifically required by the ATCPM.⁴⁹

The same reasons which underlie the imposition of liability for the negligent contravention of air safety regulations in products liability actions and air traffic control cases apply in cases of negligent airwor-

43. *Id.* at 233; FEDERAL AVIATION ADMINISTRATION, AIR TRAFFIC CONTROL PROCEDURES MANUAL § 265.2 (1961).

44. 373 F.2d at 235.

45. *Id.*; *Hartz v. United States*, 387 F.2d 870 (5th Cir. 1968).

46. As the courts have gone beyond the literal provisions of the ATCPM, the status of the law is that of the common law burden of due care in all activities. Courts prefer to rely on a contravention of a specific regulation, if possible, to bring the liability expressly under the Act. Nevertheless, as illustrated in note 41 *supra*, courts have had little difficulty furnishing a remedy under the FTCA even in the absence of a specific contravened regulation.

47. See text accompanying notes 36-40 *supra*.

48. *Furumizo v. United States*, 245 F. Supp. 981 (D. Hawaii 1965), *aff'd*, 381 F.2d 965 (9th Cir. 1967). See notes 86-91 & accompanying text *infra*. See *Hamilton v. United States*, 497 F.2d 370, 375 (9th Cir. 1974). In the recent case of *Miller v. United States*, 587 F.2d 991, 995 (9th Cir. 1978), the Ninth Circuit limited *Furumizo*: "*Furumizo* did not establish a per se rule that a controller was to issue two warnings any time there was wake turbulence. The duty to give a second warning arose when the controller has knowledge that the airplane faces an extreme danger or severe hazard from wake turbulence, such as when the controller observes the plane begin to take off toward the turbulence immediately after he or she has given a cautionary warning. This additional duty which arises with the knowledge of the extreme danger or severe hazard has been appropriately described as an 'emergency situation.'" *Id.* at 995.

49. *Stork v. United States*, 278 F. Supp. 869 (S.D. Cal. 1967), *aff'd*, 430 F.2d 1104 (9th Cir. 1970).

thiness certification. For example, in *Gibbs v. United States*,⁵⁰ a wrongful death action based upon the crash of a South Central Airlines jet, plaintiff alleged government negligence in the recertification of the airplane after it had been modified. The government denied any negligence, contending that the crash was caused by pilot error in overloading the aircraft and in mispositioning the cargo. The government also urged that if negligence on the part of the FAA were found, such negligence would not support a cause of action by the plaintiff. The court disagreed in dicta, noting instead that "[h]aving decided to enter the broad field of the regulation of the flight and repair and modifications of aircraft, . . . the Government becomes responsible for the care with which those activities are conducted."⁵¹ While the court ultimately held that FAA negligence was not the proximate cause of the accident,⁵² the clear implication of the holding was that if causation had been shown, the government would have been liable.⁵³

The dicta in *Gibbs* surfaced as the holding in *Rapp v. Eastern Air-*

50. 251 F. Supp. 391 (E.D. Tenn. 1965).

51. *Id.* at 400. This logic is based on the famous case of *Indian Towing Co. v. United States*, 350 U.S. 61 (1955), in which the Supreme Court held that where the Coast Guard assumed the duty of providing navigational aid by maintaining and operating a lighthouse, it would be liable to the same extent as a private individual if it negligently allowed the light to burn out.

52. 251 F. Supp. at 401.

53. Because no proximate cause was found the government claims that this oft-cited language of *Gibbs* is mere dicta. *Harrison & Kolczynski*, *supra* note 28, at 31. While the quotation is technically dicta, this by no means diminishes the soundness and persuasiveness of its logic.

The *Gibbs* opinion also rebuts the government's contention that liability for negligent certification makes the government an insurer against injuries from negligently manufactured airplanes. *Harrison & Kolczynski*, *supra* note 28, at 43. This argument only obfuscates the basic issue. A *manufacturer* is generally held strictly liable in tort for a dangerously defective *product*. The suit against the United States for negligent certification is not a products liability action at all, but rather alleges the *negligence* of an FAA inspector who failed to apply the regulations properly, and erroneously labeled the aircraft "airworthy." Thus, a plaintiff may not sue the United States because of a defectively manufactured airplane, if it was properly certificated according to regulatory standards. *See, e.g., Berkebile v. Brantley Helicopter Corp.*, 219 Pa. Super. Ct. 479, 281 A.2d 707 (1971), discussed at notes 36-39 *supra*, where a helicopter was properly certified by the FAA, but was held to have an unreasonably dangerous design defect.

Further, the government is not an insurer because, as *Gibbs* demonstrates, the negligence of the government either will have to supersede or equal that of the manufacturer before it will result in liability for the government. As the court in *Gibbs* emphasized: "[T]he government . . . does not become an insurer. Its liability is subject to the same requirements of negligence and causation as would affect the liability of a private person in the same circumstances." 251 F. Supp. at 400.

The FTCA expressly states that the government is to be treated as a "private person." This concept is emphasized in *Eastern Airlines, Inc. v. Union Trust Co.*, 221 F.2d 62 (D.C.Cir. 1955), where the court held that when the United States entered the business of operating a civilian airport and the control tower it assumed a role which might have been

lines, Inc.,⁵⁴ the bird ingestion case described in the introduction. Although the CAA knew from its own airworthiness testing that the engines were incapable of ingesting birds on take-off, it failed to prescribe in the Type Certificate that the engines were not to be used in areas where birds were known to congregate.⁵⁵ Although the opinion was vacated by agreement,⁵⁶ the court's holding of government liability was soundly premised on section 1421⁵⁷ of the Act, which imposed on the Administrator of the CAA⁵⁸ the duty "to promote safety of flight of civil aircraft in air commerce by prescribing . . . [certain] minimum standards governing design . . . and performance of aircraft,"⁵⁹ and requires that these duties be performed "in such a manner as will best tend to reduce or eliminate the possibility of, or recurrence of, accidents in air transportation."⁶⁰ The court found that these provisions imposed upon the CAA a duty to promote safety by prescribing and periodically revising standards governing the design and performance of aircraft engines.⁶¹ In so doing, the CAA was to consider the duty of air carriers to perform their services with the highest possible degree of safety. In sum, the CAA was required to reduce or eliminate accidents in air transportation wherever possible. The court concluded that CAA certification of the Electra, in light of that airplane's failure of the

assumed by private interests. Thus, the government was liable under the doctrine of respondeat superior, just as a private party would be.

54. 264 F. Supp. 673 (E.D. Pa. 1967), *vacated by agreement*, 521 F.2d 1399 (3d Cir. 1970). *Rapp* was the first airworthiness case which actually held the government liable for its negligence in certification. Rather than appeal this important decision, the government engaged in extensive settlement negotiations, with the apparent motive of "burying" the decision, so that it would not set what the government viewed as a dangerous precedent for future cases. In exchange for the government money, plaintiff stipulated to vacate the lower court decision. The government sought to keep the case report unpublished, but fortunately was unsuccessful. Whatever happened during these settlement negotiations did not diminish the soundness of the court's reasoning. *Rapp* has been cited in some of the major cases. See, e.g., *Arney v. United States*, 479 F.2d 653, 658 (9th Cir. 1973); *Marival, Inc. v. Planes, Inc.*, 306 F. Supp. 855, 860 (N.D. Ga. 1969). Jurisdiction in *Rapp* was based on the Suits in Admiralty Act, 46 U.S.C. §§ 741-752 (1976), and not on the FTCA. Thus, the FTCA defenses of discretionary function and misrepresentation were not considered. This, of course, does not change the question of duty which arises under the Act regardless of how jurisdiction was granted. See notes 92-95 & accompanying text *infra*.

55. 264 F. Supp. at 680-81.

56. See note 54 *supra*.

57. 49 U.S.C. § 1421 (1976) (formerly 49 U.S.C. § 551 (1951)).

58. Under the Department of Transportation Act, 49 U.S.C. §§ 1651-1659 (1976), the functions of the FAA were transferred from the Department of Defense to the Department of Transportation. The Secretary of Transportation was given ultimate authority over FAA activities.

59. 49 U.S.C. § 1421 (1976) (formerly 49 U.S.C. § 551 (1951)).

60. *Id.*

61. 264 F. Supp. at 680.

chicken test, violated this statutory duty.⁶² Although the *Rapp* opinion was vacated, and the government not surprisingly has denounced its precedential value accordingly,⁶³ the logic and reasoning of the court cannot be ignored.

The reasoning of the *Rapp* opinion was followed in the Ninth Circuit Court of Appeals decision in *Arney v. United States*.⁶⁴ *Arney* involved a claim against the United States for negligent certification of a ferry fuel system⁶⁵ which caused an airplane to crash into the ocean. The court held that because the federal government had assumed the responsibility for aircraft safety by its airworthiness certification, liability would be imposed for negligently performing its duties:

The Civil Aeronautics Act, the predecessor to the Federal Aviation Act of 1958, was enacted, and regulations promulgated thereunder, to promote civil aviation while assuring maximum safety in the air. . . . The purpose of the certification of aircraft under the 1958 Act and regulations was to reduce accidents, and the government may be liable for negligence in improper issuance of a type airworthiness certificate.⁶⁶

This case is of particular significance as the Ninth Circuit court is now deciding the latest negligent certification action.⁶⁷

The proposition that FAA safety activities, including certification,

62. *Id.* at 680-81.

63. *See, e.g.,* Harrison & Kolczynski, *supra* note 28, at 32.

64. 479 F.2d 653 (9th Cir. 1973). Jurisdiction in *Arney*, as in *Rapp*, was based not on the FTCA, but on the Suits in Admiralty Act, 46 U.S.C. §§ 741-742 (1976). This does not alter the consideration of duty under the Act. *See* note 54 *supra*, and notes 92-95 & accompanying text *infra*. The reasoning of *Rapp* apparently was followed in the unreported case of *Ciccarelli v. United States*, Civ. No. S-1940 (E.D. Cal. Feb. 15, 1972), *cited in* Harrison & Kolczynski, *supra* note 28, at 33-34. In *Ciccarelli*, a wrongful death action arising from an aircraft crash, plaintiffs alleged negligent issuance of the Type, Production, and Airworthiness Certificates. The issue of an actionable duty was raised by the government's motion to dismiss. The government claimed that the Act was designed to protect only the public as a whole, and that no actionable duty was owed to individuals. The plaintiffs agreed that the Act was designed to protect the general flying public, but asserted that the duty imposed on the FAA by the Act extended to *individuals*, including aircraft pilots, owners, and passengers. The court agreed with the plaintiffs and denied the government's motion.

65. A ferry fuel system is a long range fuel system which is added to increase the fuel capacity for a long overwater flight. In this case, appellants were hired to fly the airplane from California to Vietnam. The ferry system added 200 gallons of gasoline to the original 140 gallon capacity. The FAA inspector insisted that the auxiliary system be vented out the bottom of the aircraft, contrary to the custom of venting out the top, with the result that the system failed to deliver all of the fuel. The court reversed the summary judgment for the government, and held that there was a material issue of fact as to the inspector's negligence. 479 F.2d at 655.

66. *Id.* at 658.

67. *United Scottish Ins. Co. v. United States*, Civ. No. 70-138 (S.D. Cal. Apr. 2, 1975), *appeal docketed*, No. 76-2813-17 (9th Cir. July 30, 1975). *See* text accompanying notes 4-9 *supra*. The cases differ in that jurisdiction in *Arney* was based on the Suits in Admiralty Act, rather than the FTCA, and thus the FTCA defenses were not considered. This, of

impose a duty of due care upon the FAA, the breach of which is actionable, is thus supported by both logic and authority. The government, however, is not a guarantor of safety, nor an insurer. It does not guarantee safety because the regulations themselves, if reasonably administered, are not actionable. As the court in *Gibbs* correctly pointed out, FTCA liability is based on the same considerations as the liability of any private person. The clear impact of the case law, however, is that the government cannot escape liability for the negligent conduct of its agents in airworthiness certification by alleging that such agents are under no actionable duty of care.⁶⁸

A Discretionary Function?

The FTCA provides a number of exceptions⁶⁹ to the general waiver of government immunity. Historically, the most important of these exceptions in aviation accident litigation is that which precludes governmental liability for actions which are within the "discretionary function or duty" of any federal agency or employee.⁷⁰ In *Dalehite v. United States*,⁷¹ the Supreme Court discussed in general terms the type of discretionary decision which, although abusive or negligently made, would not support an action against the government. The discretion protected is that of "the executive or the administrator to act according to [his/her] judgment of the best course" ⁷² The Court emphasized that this "includes more than the initiation of programs and activities. It also includes determinations made by executives or administrators in establishing plans, specifications or schedules of operations. Where there is room for policy judgment and decision there is discretion."⁷³ The Court concluded that "acts of subordinates in carry-

course, would make no difference in resolving the question of duty. See notes 94-95 & accompanying text *infra*.

68. A fitting conclusion to this section is found in the words of the court in *Gabel v. Hughes Air Corp.*, 350 F. Supp. 612 (C.D. Cal. 1972): "If the . . . repetitive emphasis by Congress on *safety* does not refer to the *safety of individuals* and does not impose a duty, the violation of which is a tortious or actionable wrong, then one is led to wonder just whose *safety* Congress was talking about, or if there is some safety that is in the public interest which does not include the saving of human lives. So often, unfortunately, lawyers and judges overlook the fundamentals. There could not be a plainer creation of a duty to provide safety than is set forth in the Act and the regulations, and plainly Congress intended to grant remedies for the wrongs prohibited" *Id.* at 617 (emphasis by the court).

69. 28 U.S.C. § 2680 (1976).

70. 28 U.S.C. § 2680(a) (1976). This defense has been soundly defeated in most actions alleging negligence of FAA employees. In the latest negligent certification action, *United Scottish Ins. Co. v. United States*, Civ. No. 70-138 (S.D. Cal. Apr. 2, 1975), *appeal docketed*, No. 76-2813-17 (9th Cir. July 30, 1975), the government has not raised the issue on appeal.

71. 346 U.S. 15 (1953).

72. *Id.* at 34.

73. *Id.* at 35-36.

ing out the operations of government *in accordance with* official directions cannot be actionable."⁷⁴ Thus, only conduct of subordinate government agents *not in accordance with official directions* is actionable.

The distinction announced by the Supreme Court in *Dalehite* between discretionary or planning decisions, for which there can be no recovery, and operational or ministerial decisions, for which recovery is permitted, has proven problematic to the courts.⁷⁵ Generally, however, discretionary conduct refers only to decisions involving questions of policy.⁷⁶ Operational conduct, in contrast, refers to decisions made in the routine, day-to-day activities of governmental agencies.⁷⁷ Thus, while decisions made at the operational level involve the exercise of some discretion, they do not involve the type of discretion which is exempted under the FTCA.⁷⁸

The discretionary function distinction is best illustrated by the decisions in the great number of cases brought against the United States for the negligence of air traffic controllers.⁷⁹ The leading case, *Eastern*

74. *Id.* at 36 (emphasis added).

75. See *Mahler v. United States*, 306 F.2d 713, 723 (3d Cir. 1962), *cert. denied*, 371 U.S. 923 (1962); *Wenninger v. United States*, 234 F. Supp. 499, 503 (D. Del. 1964), *aff'd*, 352 F.2d 523 (3d Cir. 1965). While portions of the *Dalehite* opinion are no longer controlling, having been rejected by *Rayonier, Inc. v. United States*, 352 U.S. 315, 319 (1957), and *Indian Towing Co. v. United States*, 350 U.S. 61, 69 (1955), the planning-operational distinction remains and figures prominently in the FTCA cases. See generally Kennelly, *Liability of the United States Under the Federal Tort Claims Act—Some Comments Regarding Discretionary Function, Postal Matters & Intentional Tort Defenses*, 21 TRIAL LAWYER'S GUIDE 379 (1977).

76. *Eastern Airlines, Inc. v. Union Trust Co.*, 221 F.2d 62, 73-78 (D.C. Cir. 1955); W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 937 (4th ed. 1971) [hereinafter cited as PROSSER].

77. *Eastern Airlines, Inc. v. Union Trust Co.*, 221 F.2d 62, 73-78 (D.C. Cir. 1955); PROSSER, *supra* note 76, at 937.

78. In *United Airlines, Inc. v. Weiner*, 335 F.2d 379 (9th Cir. 1964), *cert. dismissed*, 379 U.S. 951 (1964), the court noted the types of conduct which have been held to be discretionary: "Discretionary to undertake fire-fighting, lighthouse, rescue, or wrecked-ship marking services, but not discretionary to conduct such operations negligently, discretionary to admit a patient to an army hospital, but not discretionary to treat the patient in a negligent manner, discretionary to establish a post office at a particular location, but not to negligently fail to install hand rails, discretionary to establish control towers at airports and to undertake air traffic separation, but not to conduct the same negligently, discretionary to reactivate an airbase, but not to construct a drainage and disposal system thereon in a negligent fashion, and discretionary for CAA to conduct a survey in low-flying, twin-engine airplane, but not for pilots thereof to fly negligently." *Id.* at 393.

79. No airworthiness certification case has dealt with the discretionary function defense in detail. *Arney* and *Rapp*, as discussed previously, were brought under the Suits in Admiralty Act rather than the FTCA, and for this reason the FTCA defenses of discretionary function and misrepresentation were not discussed. See notes 10, 54, 64 *supra*.

Airlines, Inc. v. Union Trust Co.,⁸⁰ involved a consolidation of wrongful death actions arising out of an Eastern Airlines jet crash. The Eastern jet had been cleared for landing and was on its final approach to Washington National Airport when it was struck by a P-38 fighter jet. The controller, intending only to give clearance to the P-38 for a final approach, inadvertently cleared both planes to land at the same time. The court ruled that while the promulgation by the government of landing clearance procedures in the ATCPM required the exercise of discretion, the individual instances of granting clearance to land were operational.⁸¹ The government therefore was held liable for the negligent abuse of the procedures by the employee-controller.⁸²

Another illustration of the discretionary function distinction is found in *United Airlines, Inc. v. Wiener*.⁸³ *Wiener* involved a mid-air collision between a United Airlines DC-7 airplane and a United States Air Force F-100F jet fighter. There were no survivors. Air Force personnel had been performing extensive training maneuvers in the area and had complied with their regulations calling for notification of the CAA of any such activity.⁸⁴ The jet fighter was executing a simulated instrument-approach landing which brought it into the commercial route. The court held that the failure of the CAA to inform United of the details of the hazardous Air Force training activity was negligence at the operational level.⁸⁵ While the regulations calling for notification by the CAA of any such activity were promulgated as the result of a discretionary or planning activity, individual instances of notification by the appropriate CAA controllers were merely operational tasks.

Control tower negligence cases also have involved the failure to warn a pilot of dangerous conditions, such as jet wake turbulence and

80. 221 F.2d 62 (D.C. Cir.), *aff'd sub nom.* *United States v. Union Trust Co.*, 350 U.S. 907 (1955).

81. *See id.* at 79.

82. *Id.* at 78. "The . . . [negligent acts] . . . were not 'decisions responsibly made at a planning level' and did not involve any consideration important to the practicability of the Government's program of controlling air traffic at public airports. The tower operators acted, and failed to act, at an operational level." *Id.* *See also* *Teicher v. United States*, [1978] 15 Av. L. REP. (CCH) ¶ 17,583, holding that the FAA's creation of terminal control areas and the implementation of operation procedures for them through letters of agreement between the FAA and the air carriers falls within the discretionary function.

83. 335 F.2d 379 (9th Cir.), *cert. dismissed*, 379 U.S. 951 (1964).

84. *Id.* at 396. The court affirmed, *arguendo*, the trial court's finding that the CAA had knowledge of the training procedures, thereby shifting the focus of the case to the negligence of the CAA in failing to warn United.

85. *Id.* at 397. The court relied on § 617.4(c) of the ATCPM which provided: "The primary objective of the air traffic control service shall be to promote the safe, orderly and expeditious movement of air traffic. This shall include: . . . (c) Assisting the person in command of an aircraft by providing such advice and information as may be useful for the safe and efficient conduct of a flight." FEDERAL AVIATION ADMINISTRATION, AIR TRAFFIC CONTROL PROCEDURES MANUAL § 617.4(c) (1961) (emphasis omitted).

changing weather patterns. For example, in *Furumizo v. United States*,⁸⁶ the decedent was killed while piloting a small Piper airplane, which was caught in the wake of the DC-8 jet followed at take-off. The controller had given the decedent the mandatory "cautionary information" prescribed in the ATCPM to the effect that a lighter plane should wait for the dissipation of a turbulent jet wake,⁸⁷ but the novice pilot began to take off anyway. The controller, although aware that the decedent had disregarded the warning, did nothing to stop the take-off.⁸⁸ The court interpreted "cautionary information" to require a second warning from a controller once it became apparent that the first was inadequate.⁸⁹ Thus, the procedures established by the FAA again were construed to establish only a minimum standard of care. The court, however, did not require air traffic controllers to formulate their own warning policy.⁹⁰ Rather, the court found an element of reasonableness implicit in the FAA regulations, and held that a controller's responsibility to give another warning was merely an operational task.⁹¹

While many courts have ruled similarly on the meaning of the discretionary activity exemption, there is a paucity of cases treating the issue in the context of the FAA airworthiness certification program. Three reasons account for this fact. First, the leading airworthiness certification cases, *Rapp*⁹² and *Arney*,⁹³ both were brought under the Suits in Admiralty Act,⁹⁴ to which FTCA exceptions are inapplicable.⁹⁵

86. 245 F. Supp. 981 (D. Hawaii 1965), *aff'd*, 381 F.2d 965 (9th Cir. 1967).

87. *Id.* at 988, 1000. "When controllers foresee the possibility that departing or arriving aircraft might encounter [turbulence] from preceding aircraft, cautionary information to this effect should be issued to pilots concerned." FEDERAL AVIATION ADMINISTRATION, AIR TRAFFIC CONTROL PROCEDURES MANUAL § 411.7 (1961).

88. 245 F. Supp. at 988-89, 992, 1011, 1012.

89. *Id.* at 1012 ("discretion and judgment should have been exercised by the controllers to avoid this acute and obvious hazard . . . beyond giving the stereotyped routine cautionary language"). See note 48 *supra*.

90. *Id.* at 997. The court cited *Eastern Air Lines, Inc. v. Union Trust Co.*, 221 F.2d 62 (D.C. Cir.), *aff'd sub nom. United States v. Union Trust Co.*, 350 U.S. 907 (1955). For a discussion of the conclusion in *Eastern Air Lines* that negligence occurred at the operational level, see note 82 & accompanying text *supra*.

91. 245 F. Supp. at 997.

92. See text accompanying notes 54-63 *supra*.

93. See text accompanying notes 64-67 *supra*.

94. 46 U.S.C. §§ 741-752 (1976).

95. The Suits in Admiralty Act provides the exclusive remedy against the United States for a maritime tort, when the situs of the tort is within the admiralty jurisdiction of the court. *Brady v. Roosevelt S.S. Co.*, 317 U.S. 575, 577 (1943). Thus, if an action involves a maritime tort and the jurisdiction is in admiralty, the FTCA has no application. 28 U.S.C. § 2680(d) (1976); Annot., 84 A.L.R.2d 1059, 1066-68 (1962). Wrongful death actions arising out of the same crash as the *Rapp* lawsuit were held to be within the admiralty jurisdiction of the United States in *Weinstein v. Eastern Air Lines, Inc.*, 316 F.2d 758 (3d Cir. 1963). However, in *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249 (1972), the Supreme Court rejected the notion that claims arising out of airplane accidents on navigable waters are

Second, the misrepresentation defense⁹⁶ has emerged as a more viable defense for the government.⁹⁷ Finally, the logic of the court's decision in *Hoffman v. United States*⁹⁸ seemingly has eliminated the discretionary function defense as a practical alternative. Nevertheless, the discretionary function defense warrants discussion here because commentators persist in advocating its application to the airworthiness certification problem.⁹⁹

In *Hoffman v. United States*¹⁰⁰ the court ruled that the discretionary function defense was inapplicable to a claim charging the FAA with ignoring one of its regulations governing the issuance of an Air Taxi/Commercial Operator (ATCO) certificate. The regulations prescribed, *inter alia*, that eligibility for an ATCO certificate and appropriate operations specifications depended upon holding "such economic authority as may be required by the Civil Aeronautics Board."¹⁰¹ The CAB requires an operator to carry at least \$75,000 liability insurance per passenger for bodily injury or death.¹⁰² The FAA knew that the applicant in *Hoffman* had not complied with the insurance requirement. Nevertheless, pursuant to a prior FAA intra-agency memorandum¹⁰³ instructing FAA field personnel not to deny applications merely on the basis of the failure to meet the insurance requirement, the FAA issued the ATCO certificate.

The plaintiff argued that the FAA was bound to adhere to the government standards established by its own regulations and emphasized that the statute contained no provision for informal FAA amendment to the regulations. The government contended that the decision by a senior FAA official formulating a national policy concerning the alteration of a federal statute was purely a discretionary act.¹⁰⁴ The court, finding in plaintiff's favor, ruled that FAA failure to abide by its regulations before granting ATCO certification was negligent conduct.¹⁰⁵

The court in *Hoffman* relied upon three cases in deciding that certification in contravention of regulations falls outside the discretionary

within the admiralty jurisdiction of the federal courts, thereby eliminating the Suits in Admiralty Act as a basis for jurisdiction in such cases.

96. See notes 118-59 & accompanying text *infra*.

97. The misrepresentation defense has been raised in the latest certification appeal, *United Scottish Ins. Co. v. United States*, Civ. No. 70-138 (S.D. Cal. Apr. 2, 1975), *appeal docketed*, No. 76-2813-17 (9th Cir. July 30, 1975), to the exclusion of the discretionary function defense.

98. 398 F. Supp. 530 (E.D. Mich. 1975). See text accompanying notes 100-13 *infra*.

99. Harrison & Kolczynski, *supra* note 28, at 34-38.

100. 398 F. Supp. 530, 539 (E.D. Mich. 1975).

101. 14 C.F.R. § 135.15(b) (1978); 398 F. Supp. at 532.

102. 14 C.F.R. § 298.42(a)(1) (1978); 398 F. Supp. at 532.

103. FAA Notice 8430.120; 398 F. Supp. at 532.

104. 398 F. Supp. at 532. See also Harrison & Kolczynski, *supra* note 28, at 36-37.

105. 398 F. Supp. at 534.

function exception. The first of these cases, *Marr v. United States*,¹⁰⁶ rejected the government's contention that the task of implementing established regulations for licensing pilots and aircraft was discretionary per se, noting that in some instances carrying out the regulations could be considered operational.¹⁰⁷ The second case, *Coastwise Packet Co. v. United States*,¹⁰⁸ established that government licensing will be considered operational if nothing more than the matching of facts against a clear rule or standard is involved.¹⁰⁹ The third case relied upon by the *Hoffman* court was *Hendry v. United States*,¹¹⁰ which noted a distinction between two types of licensing and certification cases—those which involved discretionary activity and those which did not.¹¹¹ The court interpreted the rulings of *Dalehite* and its progeny as insulating from liability “those decisions which either establish a rule for future governmental behavior or constitute an *ad hoc* determination which neither applies an existing rule nor establishes one for future cases.”¹¹²

106. 307 F. Supp. 930 (E.D. Okla. 1969).

107. *Id.* at 931. The CAB was sued for negligence in the issuance of a certificate of convenience and necessity to an air transportation carrier, and a pilot's license to a particular applicant. The court ruled: “The establishment of requirements for pilots and aircrafts [sic] and of methods for determining whether those requirements have been met, and the providing of landing systems and communication and weather information facilities, are discretionary functions of government. But the carrying out of those requirements and methods in some instances may not be discretionary, and it is in this respect that the plaintiff claims the government was negligent” *Id.* The court went on to dismiss the complaint, ruling that the plaintiff's allegations fell within the discretionary exception, because they all related to the planning level of government. The one allegation which appeared to be operational, that the CAB had chartered and then failed to suspend the airline, after notification of the airline's laxity in providing liability insurance for the airline's crews, was dismissed without comment. The case was important to the court in *Hoffman*, however, for the proposition that the carrying out of promulgated requirements is not discretionary per se.

108. 398 F.2d 77 (1st Cir.), *cert. denied*, 393 U.S. 937 (1968).

109. The plaintiff brought suit against the Coast Guard for its delay in granting a certificate of inspection, alleging that the standards imposed were unreasonably severe and negligently applied. *Id.* at 78. Although the court held that the Coast Guard's actions were within the discretionary function exception, their rationale provided the court in *Hoffman* with the following test: “[P]laintiff's is not a case where there was a single, known, objective standard which, because of administrative negligence, the Coast Guard failed to apply. In such an area there might be questions. *When no standard exists*, then the process of certifying, insofar as it involves groping for a standard, is within the discretionary exemption of the Act [T]his is not a case where plaintiff's property suffered damage from the negligent performance of an act the Coast Guard had undertaken after policy had been established.” *Id.* at 79-80 (emphasis added).

110. 418 F.2d 774 (2d Cir. 1969).

111. *Id.* at 782.

112. *Id.* at 783. In *Hendry*, a ship's officer sued the Coast Guard for wrongfully withholding issuance of his license based upon an allegedly erroneous determination by the United States Public Health Service that he was psychologically unfit for sea duty. *Id.* at 777. The district court dismissed the action based on the discretionary function exception.

Applying these standards, the court in *Hoffman* concluded:

While the court believes that the granting or denial of a license or certificate usually entails some amount of discretion, this is not necessarily so in all cases, *particularly*. . . [where the regulation involved] *presents clear standards to be applied to fact situations in order to determine basic eligibility*. Application of this regulation is done after the planning, or discretionary, stage—at the operational level. . . . A claim of negligence . . . in the application of this regulation would render the government liable. While the . . . cases generally involve a refusal to grant a license, the same principles apply to an allegedly wrongful decision to grant the license.¹¹³

The process of matching clear standards to the results of inspection and testing is exactly what is involved in airworthiness certification. Standards are set out in great detail in the Code of Federal Regulations.¹¹⁴ Unquestionably, the promulgation of the regulations governing the issuance of airworthiness certificates by the FAA is the result of planning or discretionary activity. Only the application of the rules by the FAA field inspectors and FAA delegates during the actual

The Second Circuit affirmed because it found no basis for a finding of negligence on the part of the government's doctors, but strongly disagreed as to the applicability of the discretionary function defense. The court outlined several factors to be considered in determining if conduct is discretionary: first, whether the grant of a license depends on a readily ascertainable rule or standard (the rule of *Coastwide Packet*, 277 F. Supp. 920 (D. Mass. 1968)); second, whether the complaint attacks the nature of the rules promulgated, or the way in which the rules are applied (a restatement of *Dalehite*); and third, whether the decisionmaker looks to considerations of public policy. 418 F.2d at 783. Finally, the court in *Hendry* questioned whether the governing statutes and regulations appeared to convey discretion to identify and consider public safety goals, and held that they did not. *Id.*

113. 398 F. Supp. at 539 (emphasis added). The court in *Hoffman* dealt with the FAA interagency memo, which instructed FAA field personnel to ignore the Federal Aviation Regulation provision, by classifying the action as one against the FAA for failing to apply the promulgated regulation, rather than as an action against the FAA questioning the validity of the decision promulgating the memo, which was, admittedly, a discretionary function. Harrison and Kolczynski accuse the court of "glossing over" the import of the memo, suggesting FAA immunity because it was handed down by a senior FAA official. Harrison & Kolczynski, *supra* note 28, at 37. The court found this argument irrelevant, because the FAA had no authority to amend the regulation by this informal method. The court thus dealt with the sole issue of the liability of a federal agency which did not carry out its own established regulations. The fact that an agency employee happens to be a senior official does not result in a privilege to disregard the rules designed to govern the agency. Whether an activity is classified as operational or discretionary depends not on *who* performs it, but rather on the *type of activity* which is performed. To argue that because an activity is performed by a senior official it is discretionary per se is to ignore completely the meaning of the case law beginning with *Dalehite*. The FAA is charged with certifying an aircraft, and it must follow the federal regulations promulgated for that purpose. If the regulations are violated, it does not matter who violates them, whether it be an FAA field inspector or a senior official. If the FAA could change its governing regulations at its will, the regulations would be rendered meaningless. It follows that the FAA cannot escape liability by classifying operational activity as discretionary.

114. See note 12 *supra*.

certification of an airplane or component is an operational activity.¹¹⁵ If, however, the regulations had not prescribed a particular test, even one which would have prevented harm, the government would be immune from liability.¹¹⁶ Thus, the discretionary function exception cannot be considered a viable defense for the government in negligent certification actions in which applicable regulations are contravened. The FAA's violation of standards and specifications established by its own regulations involves, not discretion, but abuse for which the government can and should be held liable.¹¹⁷

115. This analysis apparently finds support in the unreported case, *Ciccarelli v. United States*, Civ. No. 5-1940 (E.D. Cal. Feb. 15, 1972). See note 64 *supra*. This is the only airworthiness certification action dealing directly with the discretionary function exception. The plaintiffs alleged that the FAA inspectors negligently violated the FARs in the issuance of Type, Production, and Airworthiness Certificates. The court addressed the applicability of the discretionary function defense, and held that airworthiness certification was an operational activity.

116. This is the principle of "regulatory adjudication," which states that an unfair or otherwise inadequate regulation may not serve as a basis for a tort claim, because the promulgation of regulations is classic discretionary activity. *Harrison & Kolczynski, supra* note 28, at 26-28. See note 117 *infra*.

117. In their article, Harrison and Kolczynski suggest that when an FAA official certifies an airplane as airworthy, the certification is in fact a "regulatory adjudication." *Harrison & Kolczynski, supra* note 28, at 26-28. They argue that because of the separation of powers between the courts and the administrative agencies, and because the granting of a license or certificate is the exercise of an agency's quasi-judicial function, the agency's decision should not be reviewed by the courts. *Id.* at 26-27. Allegedly, the FAA, by its technical expertise, is particularly well-equipped to handle the certification process, as compared to the court whose retroactive determination of whether an aircraft was properly certified would be improper and unfair. *Id.* at 43-45. The position is untenable for a number of reasons.

First, the statement of the issue erroneously implies that the process of "regulatory adjudication" is yet another exception to the FTCA. In fact, it is nothing more than another application of the discretionary function exception. For example, in *Dalehite* the Court, interpreting FTCA § 2680(a), stated: "It will be noted from the form of the section . . . that there are two phrases describing the excepted acts of government employees. The first deals with acts or omissions of government employees, exercising due care in carrying out statutes or regulations whether valid or not. *It bars tests by tort action of the legality of statutes and regulations.* The second is applicable in this case. It excepts acts of discretion in the performance of governmental functions or duty 'whether or not the discretion be abused.' Not only agencies of government are covered but all employees exercising discretion." 346 U.S. at 32-33 (emphasis added). See text accompanying notes 94-95 *supra*. Thus, the decision whether or not "regulatory adjudication" is involved depends entirely upon a finding that there is a discretionary function exercised. The basic notion of regulatory adjudication is that while the agency's discretionary decision—for example, the promulgation of regulations—is only reviewable by injunction, mandamus, or declaratory judgment for an abuse of a discretionary function; such an abuse does not furnish a basis for a tort claim under the FTCA. 5 U.S.C. § 706(2)(A) (1976); *Scanwell Laboratories, Inc. v. Thomas*, 521 F.2d 941, 948 (D.C. Cir. 1975). Thus, application of the term "regulatory adjudication" adds nothing to the previous discussion of the discretionary function exception.

Second, the Administrative Procedures Act, upon which "regulatory adjudication" is based, deals only with *equitable* actions against an abusive exercise of a discretionary func-

The Misrepresentation Defense

The other major defense raised by the government, the misrepresentation exception to FTCA liability, provides that the FTCA limited waiver of sovereign immunity shall not apply to "[a]ny claims arising out of . . . misrepresentation."¹¹⁸ The courts have construed the term "misrepresentation" according to "the traditional and commonly understood legal definition of the tort,"¹¹⁹ and have thereby excluded claims arising out of negligent as well as intentional misrepresentation.¹²⁰ However, because an overly broad interpretation of the misrepresentation defense might exclude familiar forms of negligent conduct,¹²¹ courts have developed a logical limitation on the use of the

tion. 5 U.S.C. §§ 551-559 (1976) (originally enacted as Act of June 11, 1946, ch. 324, 60 Stat. 237 (1946)). For example, if a particular certification regulation was thought to be inadequate, or otherwise unfair, one might file suit against the FAA under the Administrative Procedures Act for judicial review of the regulation, possibly compelling the FAA to change the regulation. However, one could not sue the FAA in tort for damages resulting from the application of the inadequate regulations. Again, using the familiar facts of *Rapp* for illustration, if the government had not required a "bird test" before the issuance of the type certificate, and the plane had crashed, and it was later established that had the government required a bird test the accident could have been prevented, there would be no action cognizable against the FAA, because its decision not to require a bird test was discretionary.

Finally, the very rationale provided by Harrison and Kolczynski states: "Since Congress has given the FAA the primary jurisdiction to regulate and to certificate aircraft, it is improper for the district courts to arrogate to themselves the adjudicative function (which includes technical expertise as well as discretion) of retroactively determining whether an aircraft was properly certificated." Harrison & Kolczynski, *supra*, note 28 at 43. One need only examine the numerous examples of FAA negligence found in this Note to refute the extreme contention that FAA activities ought to stand beyond the scope of judicial review. Immunity from judicial review might ease the burden on FAA counsel, but it would offend the basic notions of fairness that the injured party recover damages for injury caused by the negligence of another.

118. 28 U.S.C. § 2680(h) (1976).

119. *United States v. Neustadt*, 366 U.S. 696, 706 (1961); *Fitch v. United States*, 513 F.2d 1013, 1015 (6th Cir.), *cert. denied*, 423 U.S. 866 (1975); *Lloyd v. Cessna Aircraft Co.*, 429 F. Supp. 181 (E.D. Tenn. 1977). Finding a "commonly understood" legal definition is no small task. According to Dean Prosser, the evolution of the tort of misrepresentation is entangled with the tort of deceit, and confusion of the two theories is "increased by the indiscriminate use of the word 'fraud,' a term so vague that it requires definition in nearly every case." PROSSER, *supra* note 76, at 684. While the courts have plunged forward in their task of construction, it is useful to heed Prosser's warning that "[a]ny attempt to bring order out of the resulting chaos must be at best a tentative one, with the qualification that many courts do not agree." *Id.* at 685. The Second Restatement of Torts has two sections defining negligent misrepresentation: § 552 covers pecuniary loss, and § 311 covers physical injury. RESTATEMENT (SECOND) OF TORTS §§ 311, 552 (1964).

120. *Fitch v. United States*, 513 F.2d 1013, 1015, (citing *United States v. Neustadt*, 366 U.S. 696, 706 (1961); *Annot.*, 30 A.L.R. Fed. 421 (1976)).

121. Prosser noted that a great many of the common and familiar forms of negligent conduct are essentially nothing more than misrepresentation. PROSSER, *supra* note 76, at 683. A familiar and oft-quoted example of this is the misleading turn signal given by the

defense. This limitation recognizes the distinction between actions based on governmental negligence resulting in death or injury,¹²² and those involving monetary loss from business transactions.¹²³ In the death and injury cases, the misrepresentation defense has not been successful, while in business loss actions it has.

The leading case interpreting the misrepresentation defense is *United States v. Neustadt*,¹²⁴ in which the Supreme Court held that the misrepresentation defense barred a claim by a purchaser of a home who, in reliance upon a negligent inspection and appraisal by Federal Housing Administration personnel, had been induced to pay more for the property than it was actually worth.¹²⁵ The Court ruled that economic loss suffered in reliance upon a negligent government inspection and appraisal is not actionable under the FTCA:

To say . . . that a claim arises out of "negligence," rather than "misrepresentation," when the loss suffered by the injured party is caused by the breach of a "specific duty" owed by the government to him, *i.e.*, the duty to use due care in obtaining and communicating information upon which that party may reasonably be expected to rely *in the conduct of his economic affairs*, is only to state the traditional and commonly understood legal definitions of the tort of negligent misrepresentation¹²⁶

driver of an automobile about to turn the other way. To suggest that the driver who made the erroneous turn signal "misrepresented," in the tort sense, his true intention is unreasonable. *United States v. Neustadt*, 366 U.S. 696, 711 n.26 (1961). In *Neustadt*, the Supreme Court reaffirmed its decision in *Indian Towing Co. v. United States*, 350 U.S. 61 (1955), which held cognizable a FTCA claim for property damages suffered when a vessel ran aground as the result of the Coast Guard's allegedly negligent failure to maintain the beacon lamp in a light house. The court in *Neustadt* emphasized that "[s]uch a claim does not 'arise out of . . . misrepresentation,' any more than does one based upon a motor vehicle operator's negligence in giving a misleading turn signal." 366 U.S. at 711 n.26. The court in *Ingham v. Eastern Air Lines, Inc.*, 373 F.2d 227, 239 (2d Cir.), *cert. denied*, 389 U.S. 931 (1967), feared this unreasonable interpretation of "misrepresentation" and expressly warned of the danger of a too-broad construction of the misrepresentation defense.

122. This injurious reliance on misrepresentations distinction between actions in contract and actions in tort continues to be maintained in the law. A leading example is Justice Traynor's opinion in *Seely v. White Motor Co.*, 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965), emphasizing that strict products liability, a tort action, has no application to cases of purely economic loss, which sound in warranty and contract. See notes 134-45 & accompanying text *infra*.

123. Merrill, *Compensation for Prescription Drug Injuries*, 59 VA. L. REV. 1, 73 (1973). See notes 146-59 & accompanying text *infra*.

124. 366 U.S. 696 (1961).

125. *Id.* at 697-98.

126. *Id.* at 706 (emphasis added). The *Neustadt* court cited as authority for their definition of negligent misrepresentation the Restatement of Torts § 522, which states: "One who in the course of his business or profession supplies information for the guidance of others in their business transactions is subject to liability" RESTATEMENT OF TORTS § 522 (1938). The court noted Prosser's observation that "[s]o far as misrepresentation has been treated as giving rise in and of itself to a distinct cause of action in tort," it had been con-

The Supreme Court clearly limited its decision to the use of the misrepresentation defense in cases involving economic loss.¹²⁷ Cases successfully involving the rule of *Neustadt*, however, have gone beyond the area of negligent inspection and appraisal of buildings dealt with in *Neustadt*, and now include negligent food testing,¹²⁸ weather forecasting,¹²⁹ and farm animal testing,¹³⁰ wrongful induction into the armed forces,¹³¹ and actions for indemnity or contribution by an aviation manufacturer against the government for negligent certification.¹³² On the other hand, the misrepresentation defense never has been asserted successfully as a bar to recovery in a suit for wrongful death or personal injury in an aviation disaster.¹³³

The first aviation case in which the misrepresentation defense was asserted was *Wenninger v. United States*,¹³⁴ in which the United States was sued for the death of the pilot of a small Piper Tri-Pacer. The Piper crashed after encountering trailing vortex turbulence generated by a United States C-124 military airplane flying out of Dover Air Force Base.¹³⁵ The commander at Dover and the CAA were found

financed "very largely to the invasion of interests of a financial or commercial character, in the course of business dealings." 366 U.S. 696 at 711 n.26 (citing W. PROSSER, HANDBOOK OF THE LAW OF TORTS 702, 703 (1st ed. 1941)). However, the Second Restatement of Torts § 311 includes negligent misrepresentation involving the risk of physical harm. RESTATEMENT (SECOND) OF TORTS § 311 (1964). In *Lloyd v. Cessna Aircraft Co.*, 429 F. Supp. 181, 187 (E.D. Tenn. 1977), § 311 is cited as applicable to the conduct of the federal government. Section 311 was first applied to a lawsuit against the government in *Kommanvittselskapet Harvi (R. Wigand) v. United States*, 467 F.2d 456, 459 n.4, 464 n.10 (3d Cir. 1972), *cert. denied*, 411 U.S. 931 (1973). This section apparently will encompass misrepresentation by the federal government which causes physical injury. This Note contends, however, that airworthiness certification can not be a misrepresentation, because there is no communication between the FAA and the typical airline passenger upon which reliance can be based. See text accompanying notes 153-61 *infra*.

127. *Ingham v. Eastern Air Lines, Inc.*, 373 F.2d 227, 239 (2d Cir.), *cert. denied*, 389 U.S. 931 (1967).

128. *Mizokami v. United States*, 414 F.2d 1375 (Ct. Cl. 1969).

129. *National Mfg. Co. v. United States*, 210 F.2d 263 (8th Cir.), *cert. denied*, 347 U.S. 967 (1954); *see also* *Clark v. United States*, 218 F.2d 446 (9th Cir. 1954).

130. *Rey v. United States*, 484 F.2d 45 (5th Cir. 1973); *Hall v. United States*, 274 F.2d 69 (10th Cir. 1959); *Bartie v. United States*, 216 F. Supp. 10 (W.D. La. 1963), *aff'd*, 326 F.2d 754 (5th Cir. 1964) (court refrained from passing on the issue of liability under § 2680(h)).

131. *Fitch v. United States*, 513 F.2d 1013 (6th Cir.), *cert. denied*, 423 U.S. 866 (1975). *See* *Reamer v. United States*, 459 F.2d 709 (4th Cir. 1972).

132. *Lloyd v. Cessna Aircraft Co.*, 429 F. Supp. 181 (E.D. Tenn. 1977).

133. While *Lloyd v. Cessna Aircraft Co.*, 429 F. Supp. 181 (E.D. Tenn. 1977), has been cited by the government as a successful assertion of the misrepresentation defense against a claim arising out of an aviation disaster, the suit against the government was a third party suit for indemnity or contribution. It did not test the defense as asserted directly against the plaintiff victim. See notes 154-59 & accompanying text *infra*.

134. 234 F. Supp. 499 (D. Del. 1964), *aff'd*, 352 F.2d 523 (3d Cir. 1965).

135. *Id.* at 517. Vortex turbulence is the turbulence induced by the wings moving through the air, depressing the air behind them and producing a cornucopia of rotating air

negligent in failing to warn civilian flyers in the area that the military planes were using the same navigational radio beam¹³⁶ as the civilians, thus exposing them to a risk of harm.¹³⁷

Although the plaintiffs specifically based their claim upon the government's misrepresentation of the airway as safe,¹³⁸ the court examined the character of the conduct and rejected the government's claim that the misrepresentation defense deprived the court of jurisdiction.¹³⁹

A failure to warn of an existing danger, when a duty to do so exists, is in a sense, an implicit assertion that there is no danger. For some purposes, at least, this may be properly characterized as a misrepresentation. This is not the type of misrepresentation, however, that § 2680(h) was intended to cover. This is made clear by the comments in *United States v. Neustadt* Section 2680(h) does not deprive the Court of jurisdiction.¹⁴⁰

The misrepresentation defense was raised again in *Ingham v. Eastern Airlines, Inc.*¹⁴¹ In dismissing the defense, the court reasoned that although the controller's failure to communicate up-to-date weather information technically could be considered a misrepresentation that the weather had not worsened, "the government's reading of the misrepresentation exception is much too broad, for it would exempt from tort liability any operational malfunction by the government that involved communications in any form."¹⁴² The court cited the oft-quoted passage limiting the decision in *Neustadt* to cases involving "invasion of interests of a financial or commercial character in the course of business dealings,"¹⁴³ and concluded that "[w]here the gravamen of the complaint is the negligent performance of operational tasks, rather

behind each wing. The rotation of the air is called the vortex, and the vortex is the cause of the turbulence. The combined effect of the vortex behind each wing can be analogized to the wake pattern of a high speed motor boat. This pattern of turbulence trails invisibly behind every large jet aircraft.

136. At the time of the accident, the pilot-decedent was flying in the center of Victor 16, the standard route for northeast-southwest bound traffic. These planes used as a navigational aid a radio beam transmitted from the Kenton VOR (visual omni-directional radio range station). A VOR serves as a reference point for an airplane trying to get to an airport in the vicinity of the VOR as well as a navigational aid to airplanes en route to another destination. The Kenton VOR was seven miles north of Dover, and the C-124s from Dover had been crossing Victor 16 from all directions in connection with their use of the VOR as a navigational aid, for practice instrument procedures. *Id.* at 501-02.

137. *Id.* at 517.

138. *Id.* at 505.

139. *Id.* See 28 U.S.C. § 2680(h) (1976); 28 U.S.C. § 1346(b) (1976) (jurisdiction); FED. R. Civ. P. 12(b)(1). When the government's conduct falls within one of the exceptions to the FTCA, the court lacks subject matter jurisdiction.

140. 234 F. Supp. at 505.

141. 373 F.2d 227 (2d Cir.), *cert. denied*, 389 U.S. 931 (1967).

142. *Id.* at 239.

143. *Id.* See note 126 *supra*.

than misrepresentation, the government may not rely upon § 2680(h) to absolve itself of liability."¹⁴⁴ Thus, as early as 1967, the courts had established that the misrepresentation exception was not a valid defense where the loss was other than economic, or where the essence of the asserted complaint sounded in negligence, rather than misrepresentation.¹⁴⁵

Whenever the government has asserted the misrepresentation defense in aviation cases involving economic loss, however, it has been successful. An example is found in *Marival, Inc. v. Planes, Inc.*,¹⁴⁶ in which an airplane purchaser brought an action to recover damages from the defendant seller because of the latter's misrepresentation and breach of implied warranties. The defendant filed a third party complaint against the United States under the FTCA, on the theory that defendant's statements to the plaintiff concerning the condition of the aircraft were made in reliance upon the FAA inspector's certification of airworthiness. The court carefully distinguished cases involving an allegation of negligent conduct from cases involving negligent "misrepresentation," and concluded that the misrepresentation defense was applicable.¹⁴⁷

In each of the leading cases applying the defense, the cause of action arose directly from reliance on the communication of certain erroneous facts, not from situations in which the misrepresentation was merely incidental to the negligent conduct,¹⁴⁸ as in *Ingham* and *Wiener*. The court in *Marival* concluded that the negligence of the inspectors was purely secondary, for it was the misrepresentation of the aircraft's condition upon which defendants relied in their commercial transaction with the plaintiff.¹⁴⁹ The defendant's third party complaint

144. 373 F.2d at 239. In *United Air Lines, Inc., v. Wiener*, 335 F.2d 379 (9th Cir.), *cert. dismissed*, 379 U.S. 951 (1964), the Ninth Circuit similarly rejected the misrepresentation defense, by construing the gist of the complaint: "Here, the gravamen of the action is not misrepresentation but the negligent performance of operational tasks, although such negligence consisted partly of a failure of a duty to warn." *Id.* at 398. The court realized that it would be illogical to equate the failure to warn of an existing danger with the misrepresentation of a material fact.

145. See *Murray v. United States*, 327 F. Supp. 835 (D. Utah 1971), where government-published aeronautical charts which falsely indicated that runway lighting was available at Bryce Canyon, Utah, were held not to be a "mere misrepresentation" to the pilot-decedent who, while waiting for the lights to illuminate, crashed in his plane. The wrongful death recovery was allowed.

146. 306 F. Supp. 855 (N.D. Ga. 1969).

147. The court questioned "whether the third-party complaint is founded upon an allegation of negligent inspection of the aircraft or negligent misrepresentation, through a certificate that the aircraft was airworthy." The court concluded that "an analysis will show that defendant's complaint and hopes for recovery are bottomed upon negligent misrepresentation, rather than negligent conduct." *Id.* at 858.

148. *Id.*

149. *Id.*

did not seek to recover damages for any direct injuries flowing from the negligent inspection, but rather involved an attempt to use the negligent certification as a basis for indemnity.¹⁵⁰ Significantly, the court relied upon the facts of *Rapp*¹⁵¹ to furnish an example of direct injury from a negligent certification. Thus, in dismissing the case against the government, the court in *Marival* held that this was "a classic example of detrimental reliance upon an allegedly negligent misrepresentation in a commercial transaction. It was precisely this type of action, involving direct reliance on governmental communication of facts, rather than direct injury from negligent conduct, which § 2680(h) was designed to meet."¹⁵²

In certification cases, the courts similarly have permitted the misrepresentation defense in those actions in which the manufacturer tries to escape its own obligation by bringing a third party action against the government, asserting that they would not have released the plane but for the government's approval of the airplane as airworthy.¹⁵³ The manufacturer's claim is all the more untenable in certification actions because of the FAA's delegated authorization system in which the manufacturer is substantially involved in the airworthiness certification.¹⁵⁴ For example, in *Lloyd v. Cessna Aircraft Co.*,¹⁵⁵ the court held

150. *Id.* at 860. The third party complaint stated: "Defendant shows that it acted at all times in reliance upon the certification by [FAA inspector] William W. Cook that the aircraft was airworthy; that if it should be found liable to plaintiff for any representations or express or implied warranties concerning the airworthiness of the aircraft, said representations or warranties, if any, were made in reliance on said airworthiness certification issued by the said William W. Cook; that if the aircraft is unairworthy, the said William W. Cook, Jr. did negligently make the said annual inspection and did negligently certify the aircraft was airworthy."

151. See notes 1, 54-63 & accompanying text *supra*.

152. 306 F. Supp. at 860.

153. *Lloyd v. Cessna Aircraft Co.*, 429 F. Supp. 181 (E.D. Tenn. 1977).

154. Collins, *Calling It Safe: A Hard Look at Certification*, 92 FLYING, January 1973, at 73. Collins notes: "The FAA mostly relies on the manufacturer's statements that an airplane meets the standards for certification before it issues the certificate." *Id.* The Act permits the delegation of the examination, inspection and testing necessary to the issuance of certification, to any properly qualified person, or his employee. 49 U.S.C. § 1355(a) (1976). There are three types of delegation. "Delegation Option Authority" allows the Administrator to delegate the responsibility to test and determine conformity with the small-airplane certification regulations to the manufacturers themselves. 14 C.F.R. §§ 21.231-293 (1978). The "Designated Engineering Representatives" program allows the Administrator to delegate certification authorization to specialists in the different manufacturing fields, such as powerplant, airframe, systems and equipment, and flight test, in order to simplify the certification of larger, more complex equipment. These specialists, who are employed directly by the manufacturers, approve the manufacture of the airplanes under the regulations prescribed by the FAA. 14 C.F.R. § 183.29 (1978). Manufacturers may also employ "Designated Manufacturing Inspection Representatives" who are permitted to issue Airworthiness Certificates when they inspect an airplane and find it in conformity with the regulations. 14 C.F.R. § 21.3 (1978).

that the manufacturer's claim for indemnity or contribution against the government, based on the FAA's negligence in inspecting and testing the aircraft prior to certification, was barred by the misrepresentation exception.¹⁵⁶ The court particularly relied on the unreported case of *Bibbig v. United States*.¹⁵⁷

In *Bibbig* the plaintiff sought damages for the crash of a motorized glider which allegedly had been inspected negligently and issued an Airworthiness Certificate by the FAA.¹⁵⁸ The government asserted the misrepresentation defense, and the court granted the government's motion for summary judgment.¹⁵⁹ The court's opinion in *Lloyd* emphasizes the fact that "explicitly rejected [in *Bibbig*] was the plaintiff's contention that cases in which the misrepresentation [defense] was applied to a commercial setting were irrelevant to the facts of such lawsuit."¹⁶⁰ The court in *Lloyd* apparently was seeking justification for its approval of the misrepresentation defense despite the fact that the defense had never barred recovery in an air disaster. The court, however, overlooked an important distinction: In *Marival* and *Lloyd*, the party against whom the defense was successfully asserted had been involved directly with the government. In *Marival*, the injured party was the seller of an airplane who had made warranties after the FAA had certified his airplane. In *Lloyd*, the manufacturer was, in fact, barred from recovery in an indemnity action, ostensibly because it was directly involved with the FAA through delegated certification procedures.

In contrast, the misrepresentation defense has never been used to bar the claim of a party injured in another's aircraft. Unlike the airplane manufacturer, or the owner of an airplane, the typical airplane passenger has no contact with the FAA, and therefore any communication by which a misrepresentation could be transmitted is difficult to find. And, assuming arguendo that there is some communication, the substance of the alleged false representation is similarly difficult to imagine. While the public is no doubt aware that the aviation industry is highly regulated, in all probability few persons who are the passengers of commercial aviation have even heard of airworthiness certification, much less rely on it before stepping into an airplane:

People have never flown airplanes because they are safe. They fly them because they are fast, or they fly them because they are fun. When the current procedures and rules started to evolve 25 years ago, the fast-and-fun part was *all* that counted. People still fly because it is fast and fun, and not because it is safe, but they do expect

155. 429 F. Supp. 181 (E.D. Tenn. 1977).

156. *Id.* at 182.

157. Civ. No. C-4604 (D. Colo., filed May 3, 1973).

158. 429 F. Supp. at 186.

159. *Id.*

160. *Id.*

the product—the airplane—to meet a very high standard as far as safety potential goes.¹⁶¹

Individual instances of negligent certification cannot be classified as misrepresentations to the unfortunate passengers of the doomed flight.

Conclusion

Public policy and traditional tort law principles preclude the government, which has assumed the responsibility of regulating aviation safety, from insulating itself from liability for the failure of its agents or employees to implement the strict regulations which the FAA has promulgated to insure that only airworthy planes are flying. The plaintiff who sues the government for negligent certification typically has encountered three defenses under the FAA. First, the government attempts to avoid liability by claiming that the Act establishes no duty of care toward *individual* members of the public, but rather is designed to secure the safety of the public as a whole. The courts have rejected this notion totally, holding that safety regulation by the FAA does give rise to a cause of action in tort if such safety regulation is conducted negligently. Second, the government argues that the process of certification is a discretionary function which is shielded from liability by the most popular exception to government liability under the FTCA. The courts, however, have held that where the certification or licensing involves the process of matching clear standards to the facts of the case, the activity is to be considered merely operational, and thus not within the discretionary function exception. Finally, the government claims that airworthiness certification, if conducted negligently, is a mere misrepresentation of the condition of the airplane, and as such, is shielded from liability under the FTCA misrepresentation exception. *Lloyd v. Cessna Aircraft Co.*,¹⁶² however, has affirmed the distinction that the misrepresentation defense can only be applied to cases involving either an economic loss, or a direct communication between the plaintiff and the government. Thus, an individual who suffers personal injury because of negligent certification should not be cut off from recovery.

The government is liable under the FTCA for negligent acts or omissions of its agents whenever a private employer, under the same circumstances, would be liable. Suit for negligent certification does not attempt to hold the government liable for anything more than the negligence of its employees. It does not seek to make the FAA a guarantor of the products used in air commerce, nor does it require absolute safety. It does not even suggest that the standards promulgated by the FAA be stringent enough to catch all errors and defects which, if de-

161. Collins, *Calling It Safe: A Hard Look at Certification*, 92 FLYING, January 1973, at 76.

162. 429 F. Supp. 181 (E.D. Tenn. 1977); See notes 154-59 & accompanying text *supra*.

tected, might prevent the occurrence of an aviation disaster. Rather, suit for negligent certification merely attempts to hold a negligent tortfeasor liable for the damage which such negligence inflicts; the FAA inspector who certificated an airplane which failed to conform to federal standards. The principle of respondeat superior allows the victim to look to the inspector's employer—the federal government—for compensation.

Of course, the manufacturer built the defective airplane, and the manufacturer normally is held strictly liable for any dangerous defect. Why, therefore, should recovery be allowed against the government? Because, in the case of the negligently certificated airplane, the aviation manufacturer is only one of two joint tortfeasors. The government, not the manufacturer, places an airplane into the stream of commerce. There has never been a rule of law whereby the government may escape its liability merely because the plaintiff has the option of recovering against another.

An airplane is not an automobile, or a boiler, or a lathe, or any of the thousands of products upon which products liability actions traditionally are based. The airplane is unique, and recognizing this, the government stringently regulates every phase of aircraft construction and air transportation. It is neither reasonable nor realistic to suggest that there is to be no recovery against the government when it is negligent in this endeavor.